No. 91-2051

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF SOUTH DAKOTA IN ITS OWN BEHALF, AND AS PARENS PATRIAE,

Petitioner,

v.

GREGG BOURLAND, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF *AMICI CURIAE* STANDING ROCK SIOUX TRIBE, LOWER BRULE SIOUX TRIBE, AND THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

The Standing Rock Sioux Tribe, the Lower Brule Sioux Tribe and the Three Affiliated Tribes of the Fort Berthold Reservation are federally recognized Indian Tribes with Reservations along the Missouri River. *Amici* Tribes were subject to specific congressional enactments under which the United States purchased Indian lands for Missouri River flood control projects. Act of September 2, 1958, 72 Stat. 1762 (Standing Rock); Act of September 2, 1958, 72 Stat. 1773 (Lower Brule); Act of

October 3, 1962, 76 Stat. 698 (Lower Brule); Act of October 29, 1949, 63 Stat. 1026 (Fort Berthold).

SUMMARY OF ARGUMENT

This Court's decisions in *Montana v. United States*, 450 U.S. 544 (1981) and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) do not hold that tribes are automatically divested of all civil regulatory authority over non-Indians whenever Congress converts reservation trust lands into fee ownership. *Montana* and *Brendale* examined the intent of Congress in the General Allotment Act and subsequent statutes under which large portions of selected Indian reservations were sold to homesteaders who became permanent residents of reservation lands they entered. South Dakota's argument that *Montana* and *Brendale* create a *per se* rule barring all tribal civil jurisdiction over non-Indians on all reservation fee lands—without regard to the intent of Congress in the specific statute under which the lands left trust status—must be rejected. In each instance, the intent of Congress must be considered and controls. Examination of that congressional intent, moreover, proceeds in accordance with the principle that a statute will not be construed to abrogate or modify tribal treaty rights where it can be construed to preserve those rights. *E.g.*, *County of Yakima v. Yakima Nation*, 502 U.S. ——, 116 L.Ed.2d 687, 704 (1992).

This case involves not an allotment act but the Cheyenne River Taking Act of September 3, 1954, 68 Stat. 1191. Its limited purpose was to secure title to the United States to reservation lands needed for a federal flood control project. Unlike the General Allotment Act, the Cheyenne River Taking Act contained no invitation to non-Indians to settle permanently the lands being taken from the Indians. Tribal rights to hunt and fish, prospect for minerals and graze on the lands taken by the United States were specifically preserved in the Act, as were aspects of tribal governmental authority. While the Act provides certain limits on these tribal rights—including overriding federal authority to impose regulations and a provision allowing non-Indians to enter the reservoir temporarily to hunt and fish—it otherwise provides for retention of tribal authority over hunting and fishing by non-Indians in the reservation lands subject to the Act.

ARGUMENT

The issue in this case is whether a Tribe has civil regulatory authority over hunting and fishing by non-Indians on lands within its Reservation purchased by the United States under a special statute with a limited purpose—to provide the United States with title to Indian lands necessary for a federal flood control project. Act of September 3, 1954, c. 1260, 68 Stat. 1191 (hereafter "Cheyenne River Taking Act" or "Taking Act"). It is uncontested that the lands at issue are on the Cheyenne River Sioux Reservation, and that the Tribe has jurisdiction over hunting and fishing by its own members on those lands.[1] The Tribe is not claiming an absolute right to bar non-Indians from the lands at issue, or even exclusive jurisdiction to regulate hunting and fishing activities.[2] At issue here is whether the Taking Act—under

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[1] *South Dakota v. Bourland*, 949 F.2d 984, 990 (8th Cir. 1991); *see also* Petitioner's Brief (hereafter "Pet. Br.") p. 9 n.4 (State did not appeal District Court ruling that the Cheyenne River Taking Act did not diminish the Reservation); *see also Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 821 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984) (similar Taking Acts did not diminish Lower Brule Sioux Reservation; State has no jurisdiction to regulate Indian hunting and fishing on those lands).

[2] The Cheyenne River Taking Act authorizes the Secretary of the Army to "enact and enforce regulations to safeguard the projects." *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 825 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984). The issue of possible State concurrent jurisdiction was not presented to or decided by

which the United States purchased lands as to which the Tribe retained a considerable measure of rights—silently divested the Tribe of regulatory authority over non-Indian hunting and fishing on lands purchased under the Act.[3]

At the heart of this case are competing views of the reach of this Court's decisions in *Montana v. United States*, 450 U.S. 544 (1981) (hereafter "*Montana*"), and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (hereafter "*Brendale*"). South Dakota reads *Montana* and *Brendale* as absolutely barring all tribal civil regulatory jurisdiction over non-Indians on *any* nontrust reservation lands—irrespective of the intent of Congress in the statutes under which the particular lands at issue left trust status, and irrespective of the nature and scope of the tribal regulation or the circumstances surrounding it.[4] Under South Dakota's formulation, a court reviewing a challenge to a tribal assertion of jurisdiction over non-Indians need only check the title to the land under consideration—and if it finds the lands to be in fee rather than trust status, any tribal assertion of civil regulatory jurisdiction must be rejected.

Amici submit that South Dakota's broadside approach misreads *Montana* and *Brendale*. Those cases do not sanction the imposition of a judge-made rule that tribal jurisdiction is completely divested as to non-Indians on

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the Court of Appeals in this case. *South Dakota v. Bourland*, 949 F.2d at 990 n.13.

[3] *Amici* do not address the issue of the lands—approximately 18,000 acres—which were acquired by the United States from non-Indians. This brief focuses on lands—approximately 10,500 acres—which were subject to the Cheyenne River Taking Act.

[4] South Dakota would acknowledge tribal jurisdiction over non-Indians on nontrust lands only where the non-Indians consent or where Congress specifically delegates such jurisdiction to a tribe. Pet. Br. p. 21 n.13.

all nontrust lands, as South Dakota urges.[5] Rather, they teach that the intent of Congress governs, and each statutory scheme must be separately considered. *Montana* and *Brendale* followed this analysis by examining the unique policy in the 1887 General Allotment Act. *Montana* and *Brendale* do not dictate a "bright line" or *per se* rule as to every circumstance where a tribe asserts any regulatory jurisdiction over non-Indians who temporarily enter reservation fee lands. In fact, in conformity with well established principles of federal Indian law, such a *per se* rule was recently rejected by this Court's unanimous decision in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 853-56 (1985) ("existence and extent of . . . tribal . . . [civil] jurisdiction will require careful examination"; *per se* rule of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) does not apply to civil regulatory jurisdiction over non-Indians).

I. EXAMINATION OF CONGRESSIONAL INTENT IS REQUIRED HERE.

The governing standard—that divestiture of tribal rights turns on the intent of Congress in the specific

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[5] *Montana* and *Brendale* recognized that tribal jurisdiction over non-Indians on fee lands may exist under certain circumstances. In *Montana*, the Court stated that tribes may have jurisdiction over non-Indians on fee lands which were subject to the Allotment Act in two circumstances: (1) where non-Indians enter "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" or (2) where non-Indian conduct on fee lands "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 565-566.

In *Brendale*, Justice White's opinion clarified that the second *Montana* exception does not apply in every case, but rather "depends on the circumstances." 492 U.S. at 429. And, Justice Stevens' opinion in *Brendale* acknowledged that the power to exclude others was logically distinct from the power to regulate—and found circumstances in the closed area of the Yakima Reservation in which the latter power survived although the former did not. *Id.* at 433, 444.

statute at issue—is demonstrated by this Court's recent jurisprudence in the reservation disestablishment cases. Each disestablishment case has a set of basic circumstances in common—each involves a reservation as to which a tribe has been promised exclusive use and occupancy, and in each the reservation has been subject to allotment and the opening of surplus lands to non-Indian homesteaders under an allotment era statute. Despite these similarities, this Court has rejected sweeping, judge-made rules, insisting instead that the particular congressional intent in each case must be controlling. As the Court's unanimous opinion in the Cheyenne River disestablishment case states:

> Although the Congresses that passed the surplus land Acts anticipated the imminent demise of the reservation and, in fact, passed the Acts partially to facilitate the process, we have never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land Act. Rather, it is settled law that some surplus land Acts diminished reservations, *see, e.g., Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975), and other surplus land Acts did not, *see, e.g., Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent*, 368 U.S. 351 (1962). The effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage.

Solem v. Bartlett, 465 U.S. 463, 468-69 (1984).

Beyond requiring an inquiry into the intent of Congress in the specific enactment at issue, this Court has also imposed prudential safeguards against congressional action unintentionally divesting tribal rights. While the formulations vary somewhat, the essential principle is that tribal rights are not lost unless Congress clearly provides for such loss. *E.g., United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 353 (1941) (tribal title not extinguished absent "clear and plain" congressional intent); *Choate*

v. Trapp, 224 U.S. 665, 675-676 (1912) (taxability of Indian lands, "doubtful expressions" in the statute must be resolved in favor of the Indians); *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968) (intent of Congress to abrogate tribal hunting and fishing rights would not be "lightly imputed to the Congress"); *Solem v. Bartlett*, 465 U.S. 463, 472 (1984) (diminishment of reservation boundaries requires "substantial and compelling evidence of congressional intention. . ."); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 (1982) (tribal taxing authority over non-Indians not divested absent "clear indications" that Congress so intended).[6] As Justice Scalia recently wrote for the Court:

> When we are faced with . . . two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."

County of Yakima v. Yakima Nation, 502 U.S. ——, 116 L.Ed.2d at 704, *quoting Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

South Dakota seeks to have this Court ignore these principles and, without examination of the Taking Act, to hold that *Montana* and *Brendale* compel a finding that the Tribe lacks any civil jurisdiction over non-Indian hunting and fishing on Taking Area lands. *Amici* urge this Court to preserve its traditional deference to the intent of Congress and not to supplant it with a broad, judge-made rule. Examination of the fundamental differences in congressional intent in the Allotment Act

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[6] Contrary to South Dakota's contention, Pet. Br., pp. 35-37, the "clear intent" rule applies to cases involving tribal governmental authority, as well as those involving individual exercise of treaty rights. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 (1982).

from its intent in the Taking Act demonstrates why South Dakota's proposed *per se* rule should be rejected.

II. THE ALLOTMENT ACT AND THE TAKING ACT WERE FUNDAMENTALLY DIFFERENT STATUTES, REFLECTING DISSIMILAR CONGRESSIONAL INTENT.

A. Congressional Intent in the Allotment Policy Was Unique.

Federal Indian policy has vacillated widely over the course of more than two centuries—at certain times seeking to protect tribes in their rights and dealings, and at others seeking to divest the ~~tribes~~ of their lands and foster assimilation of Indians into the American melting pot.[7] Among the various policies implemented by Congress, allotment was unique. While there were many policies which were designed to take Indian lands, only allotment expressly offered former Indian lands to non-Indians who agreed to homestead those lands, or purchased or inherited them from individual allottees under the statutory scheme.

This aspect of allotment—the promises expressly and implicitly made by Congress to the non-Indians who permanently settled the reservations under the terms of an allotment act—sharply distinguishes allotment from other federal Indian policies. And this aspect of allotment provides a clear explanation of *Montana* and *Brendale*: in inducing non-Indians to settle on Indian reservations, Congress did not intend in the allotment acts for those non-Indians to be subject to comprehensive tribal authority on their own lands. This, we submit, is what the Court had in mind when it stated in *Montana* that "[i]t defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed

[7] *See generally* F. Prucha, *The Great Father* (1984).

purpose of the allotment policy was the ultimate destruction of tribal government." *Montana*, 450 U.S. at 559 n.9.

The General Allotment Act of 1887 worked a vast change in federal Indian policy. Throughout most of the 19th century, federal policy centered on entering treaties, seeking peace and the cession of tribal lands, and establishing, in return, Indian reservations which were to be permanent, inviolate homelands for the tribes. But this policy of establishing separate, albeit reduced, areas for the tribes came under attack essentially from its inception. By the late 19th century, "the prevailing national policy of segregating lands for the exclusive use and control of the Indian tribes gave way to a policy of allotting those lands to tribe members individually." *County of Yakima v. Yakima Nation*, 502 U.S. ——, 116 L.Ed.2d 687, 695 (1992).

The allotment policy arose from two rather distinct notions. On the one hand, allotment was supported by the philanthropists of the day, who thought that breaking up tribal landholdings into parcels held by individual Indians would "civilize the Indian." Felix S. Cohen's *Handbook of Federal Indian Law*, 132 (1982 ed.) (hereafter "*Cohen*").

> Humanitarian reformers were convinced that termination of tribal life was necessary if the Indian was to participate fully in the American system. Allotment was central to a civilization program because the difference in Indian and white concepts of property was considered fundamental. In general, reformers agreed that "the white man's way was good and the Indian's way was bad."

Id. at 131-132, *quoting* D.S. Otis, *The Dawes Act and the Allotment of Indian Lands*, 9 (1973) (footnotes omitted).

On the other hand, as this Court has recognized, allotment was also a response to the "familiar forces" of non-Indians who wanted Indian lands. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 590, 606, 609 (1977). In some cases,

the familiar forces were essentially the local non-Indians on the frontier adjacent to a reservation—the "nearby and growing population of white farmers, merchants, and railroad men . . . urging authorities in Washington to open the reservation to general settlement." *DeCoteau v. District County Court*, 420 U.S. 425, 431 (1975). In others, the familiar forces were the general mass of non-Indians hungry for western lands. Overall, the "continuing demand for new lands for the waves of homesteaders moving west" was a powerful impetus, moving Congress to adopt the General Allotment Act, and the subsequent surplus land acts opening particular allotted reservations to non-Indian settlement. *Solem v. Bartlett*, 465 U.S. 463, 466 (1984).

These twin purposes of allotment—"civilizing the Indian" and providing land for homesteaders[8]—were reflected in the two major components of the General Allotment Act itself. The Act authorized the President to divide tribal lands into allotments for individual Indians—160 acres for each head of a family. The allotments were to be held in trust by the United States and not subject to alienation for a period initally fixed at 25 years. General Allotment Act of February 8, 1887, c. 119, 24 Stat. 388; *see also Cohen* at 130-132.[9]

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[8] Supporters of allotment generally believed that settling whites among Indians would further the "civilizing" process. D.S. Otis wrote that

> the Indian was to learn valuable lessons from his white neighbors. This sentiment was frequently repeated. An Indian agent wrote in 1885 that the land when opened "would soon be taken up, and these settlers would at once begin to open farms, and to set an example of thrift and self-support by the side of their Indian neighbors."

D.S. Otis, *The Dawes Act and the Allotment of Indian Lands*, 17 (1973) (footnote omitted).

[9] Under the 1906 Burke Act, c. 2348, 34 Stat. 182, 25 U.S.C. 349, Congress authorized the Secretary of Interior to issue patents in fee before the expiration of the 25 year trust period to Indians deemed to be "competent." This led to involuntary issuance of

The General Allotment Act also authorized the purchase by the United States of all tribal lands remaining after the Indians received their allotments. The United States was authorized to dispose of these "surplus" lands to "actual settlers" and to issue patents to those taking the lands "for a homestead." 24 Stat. 388, 390. Soon, this aspect of the allotment policy was being implemented "on a reservation-by-reservation basis" with individual surplus land acts covering particular reservations. *Solem v. Bartlett*, 465 U.S. at 467. In most of the later surplus land acts, the United States did not undertake to purchase the surplus lands at all—but instead simply opened the lands to purchase under the homestead, mineral and townsite laws, and acted as the "Tribe's sales agent" in disposing of the lands to homesteaders. *Id.* at 473; *see also Seymour v. Superintendent*, 368 U.S. 351, 356 (1962).

Although the allotment policy proved a dismal failure in many respects and was reversed by Congress in 1934, it did succeed in its avowed goal of transferring Indian lands to non-Indian homesteaders.

> The majority of Indian lands passed from native ownership under that allotment policy. Of the approximately 156 million acres of Indian lands in 1881, less than 105 million remained by 1890, and 78 million by 1900. Indian land holdings were reduced from 138 million in 1887 to 48 million in 1934. . .

Cohen at 138. As Theodore Roosevelt, who was President during a portion of the allotment era, tersely summarized it, "The General Allotment Act is a mighty pulverizing engine to break up the tribal mass." C. Wilkinson, *American Indians, Time and the Law*, 19 (1987).

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substantial numbers of fee patents to Indians. In this process "'abuses were rampant'" and substantial Indian lands were lost. *Nichols v. Rysavy*, 809 F.2d 1317, 1322 (8th Cir. 1989), *quoting Bordeaux v. Hunt*, 621 F. Supp. 637, 640 (D.S.D. 1985).

What sets allotment apart, then, is that in the allotment acts Congress promised and provided land to non-Indian settlers—at the same time it broke up tribal lands in an effort to bring about the ultimate destruction of tribal governments. The non-Indians, for their part, did not typically expect continued tribal governmental authority to pertain to their homesteaded lands.

> Non-Indians often obtained Indian land through fraud or sharp dealing. Yet the fact remains that the United States invited its citizens to homestead Indian land and that non-Indians accordingly built homes and livelihoods within reservation boundaries. If many entered by means of illicit if not illegal transactions born of avarice, many others came simply in pursuit of honest dreams opened up by the homestead policy. . . . Doubtless there are cases where homesteaders were altogether oblivious of the fact that their new homes were within Indian reservations. These settlers came as families to open new land, not to do business with Indians.

C. Wilkinson, *American Indians, Time and the Law*, 22-23 (1987).

Those non-Indian expectations clashed with the tribes' expectations that the promises of the treaties with the United States would be honored and that their preexisting treaty-based governmental authority over the entire reservation would be preserved. *Montana* and *Brendale* addressed these conflicting sets of expectations, and held that the congressional intent with respect to allotment precludes comprehensive tribal regulatory authority over non-Indians on lands which they entered pursuant to the federal invitation.[10]

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[10] As noted in *Montana* and *Brendale*, exceptions exist with regard to tribal jurisdiction over non-Indians on fee lands which were subject to the Allotment Act. *See* n.5 *supra*.

B. Congress Enacted the Cheyenne River Taking Act To Obtain Title to Land for a Flood Control Project, Not To Provide Land to Non-Indians.

In contrast with the Allotment Act's broad intent to reshape federal Indian policy and relations between Indians and non-Indians nationwide, the Cheyenne River Taking Act had a single, limited federal purpose—to convey title to the United States of those particular Indian lands on the Cheyenne River Reservation "required by the United States for the reservoir to be created by the construction of the dam across the Missouri River in South Dakota now known as Oahe Dam. . . ." Taking Act, Section I.[11] In keeping with this limited purpose, in the Taking Act "[s]ignificant portions of the 'bundle of property rights' explicitly were reserved to the Tribe," 949 F.2d at 993, including the right to extract minerals (Section VI), the right to remove timber and salvage improvements (Section VII), the right to remain on the taken lands until the closure of the dam (Section IX), the right to graze livestock (Section X), and "the right of free access to the shoreline of the reservoir including the right to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States." (Section X.)[12] These users, of course,

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[11] The Taking Act was enacted after the policy of allotment came to "an abrupt end in 1934 with passage of the Indian Reorganization Act . . .", which returned "to the principles of tribal self-determination and self-governance which had characterized the pre-Dawes Act era. . . ." *County of Yakima v. Yakima Nation*, 502 U.S. at ——, 116 L.Ed.2d at 696.

[12] This specific reservation of hunting and fishing rights should be construed in the context of contemporaneous enactments relating to such rights. In 1953, Congress enacted Public Law 280, providing a general authorization for states to assume jurisdiction over Indian country. Congress specifically withheld any transfer of jurisdiction regarding hunting and fishing—preserving Indian hunting and fishing rights. 18 U.S.C. 1162(b).

In 1960, Congress enacted a general statute prohibiting any person from trespassing on Indian lands by hunting or fishing without

were to enter the reservation temporarily for recreational purposes, not reside permanently upon it like the homesteaders under the allotment policy.

In addition, the Taking Act contained other provisions recognizing continued tribal governmental authority, including the right of the Tribal Council to select and designate the relocation of cemeteries (Section III), and the right of the Tribal Council to determine how to handle the removal of timber left by its individual Indian owners (Section VII). Moreover, the Taking Act provided that, in addition to payment for compensation for the taken lands, $5.16 million would be placed in the Treasury for the Tribe to restore the "economic, social, religious and community life" of the Tribe—and this rehabilitation fund would be expended "upon the order and direction of the Tribal Council of said Tribe." (Section V.)

All of these provisions, preserving tribal property rights and recognizing tribal governmental authority, are in stark contrast with the allotment acts, under which Congress showed no such deference to the continuing vitality of tribes. South Dakota seeks to blur this sharp distinction by labeling the Taking Act as a termination act and contending that Congress' intent in termination acts, as in the allotment acts, was to eliminate tribal government. Pet. Br. pp. 31-33. But the relationship between allotment and termination is of no moment here. The Taking Act was clearly not a termination act. The comments of Congressman Berry relied on by South Dakota in this regard (Pet. Br. p. 32) reflect, at most, his notion

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tribal authority. 18 U.S.C. 1165. The statute applies to trust lands *and* "lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon . . . ." *Id.* Unlike lands which are held in fee under an Allotment Act such as those in *Montana*, Taking Area lands—pursuant to Section X of the Taking Act—are "reserved for Indian use" for hunting and fishing. *See also* 16 U.S.C. 3372, 3371(c) (federal offense to take wildlife in violation of tribal law on *any* lands on an Indian Reservation).

of what might be desirable future legislation—not his understanding of the thrust of the Taking Act. Comparison of the Taking Act with an actual contemporaneous termination act—which South Dakota does not undertake in its brief—is instructive. For example, the key provisions of the Menominee Termination Act of June 17, 1954, c. 303, 68 Stat. 250, call for the per capita distribution of tribal funds to individual tribal members (Section 5); the end of federal responsibility for the supervision and services to the Tribe and its members regarding, *inter alia*, health, education, welfare, credit, roads, and law and order (Section 7); the transfer of lands held in trust by the United States to the Tribe (Section 8); an end to the application to members of the Tribe of federal statutes which apply to Indians (Section 10); and application of state law—"the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction." (Section 10.)

The Taking Act, enacted the same year as the Menominee Termination Act, contains *none of* these provisions. To the contrary, the Taking Act and the Menominee Termination Act are fundamentally different in every respect. Most strikingly, the Menominee Termination Act reflects the express language Congress used when it intended state law to control. Furthermore, this Court has held that even the Menominee Termination Act—despite its broadly stated policies to remove federal protections and impose state law—did *not* abrogate tribal rights to hunt and fish free of state jurisdiction. *Menominee Tribe v. United States*, 391 U.S. 404 (1968).

The Taking Act was, in short, neither a termination act nor an allotment act. It did not end the federal responsibility to the Tribe or divide tribal funds among tribal members like a termination act. Most significantly, the Taking Act did not invite non-Indians to homestead former Indian lands, as the Allotment Act did, and thus

did not create the same expectations on the part of non-Indians or reflect the same congressional intent in that critical regard. As a result of these differences, unless congressional intent is to be ignored, *Montana* and *Brendale* do not dictate an outcome that the Taking Act by changing land title from trust to fee foreclosed all tribal authority over non-Indians.

III. THE CHEYENNE RIVER TAKING ACT DOES NOT DIVEST TRIBAL AUTHORITY TO REGULATE HUNTING AND FISHING ACTIVITIES BY NON-INDIANS IN THE OAHE TAKING AREA.

Like its position on *Montana* and *Brendale*, South Dakota's view of the Cheyenne River Taking Act is that it imposes an absolute bar with regard to *any* tribal authority to regulate non-Indian hunting and fishing on the Reservation lands subject to the Act. The Taking Act, on the contrary, expressly *preserved* a measure of the Tribe's hunting and fishing rights.

As South Dakota concedes (Pet. Br. p. 16), the 1868 Sioux Treaty, 15 Stat. 535, set apart the lands of the Great Sioux Reservation, including the lands now comprising the Cheyenne River Sioux Reservation, "for the absolute and undisturbed use and occupation" of the Sioux Tribes. Prior decisions of this Court teach that this treaty right included exclusive rights to hunt and fish, *e.g.*, *Menominee Tribe v. United States*, 391 U.S. 404, 406 (1968) (treaty reserves rights to hunt and fish even though it does not specifically mention hunting and fishing rights); *accord Kimball v. Callahan*, 493 F.2d 564, 566 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974); *State v. Tinno*, 94 Idaho 759, 497 P.2d 1386 (1972). It is likewise clear that a tribe can regulate non-Indians the tribe might permit temporarily to enter reservation lands to hunt or fish. *E.g.*, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).

The 1954 Cheyenne River Taking Act contains an explicit recognition of the Tribe's "right of free access to

the shoreline of the reservoir including the right to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations governing corresponding use by other citizens of the United States." Taking Act, Section X. This provision "contemplates *reservation* of fishing and hunting rights by the Indians." H.R. Rep. No. 2484, 83rd Cong., 2d Sess. 10 (1954) (emphasis supplied).[13] While payment for the loss of hunting and fishing rights—including the resulting revenues from permit fees—would have been required had those rights been extinguished, the Tribe was not paid for the taking of its treaty rights.[14]

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[13] South Dakota and its supporting *amici* rely on the last sentence of section 4 of the Flood Control Act of 1944, 58 Stat. 887, 889-890, *codified as amended at* 16 U.S.C. 460d, as implicitly conferring on the State exclusive regulatory control over Lake Oahe. (Pet. Br. p. 28) (Int'l Ass'n of Fish and Wildlife Agencies Br. p. 23.) The Court of Appeals for the Eighth Circuit has rejected this argument and has construed the 1944 Act as "creat[ing] a general scheme of federal, not state, regulation of the flood control projects. . ." *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d at 825. The entirety of section 4 supports this reading. It states in pertinent part:

> The water areas of all such reservoirs shall be open to public use generally, without charge, for boating, swimming, bathing, fishing, and other recreational purposes, and ready access to and exit from such water areas along the shores of such reservoirs shall be maintained for general public use, *when such use is determined by the Secretary of War not to be contrary to the public interest, all under such rules and regulations as the Secretary of War may deem necessary*. . . . No use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated.

16 U.S.C. 460d (emphasis added).

[14] The Tribe was compensated for the *wildlife* which was to be actually destroyed by the flooding of Indian lands. This payment was for the destruction of animals that inhabited the lands adjoining the river whose habitat was destroyed, not for the loss of its treaty protected right to regulate hunting and fishing—and the commensurate right to raise revenues through the exercise of that right. H.R. Rep. No. 2484 at 4-6. *See also Lower Brule Sioux Tribe,*

During consideration of the bill which became the Taking Act, the Department of the Army opposed the provision which included the hunting and fishing language on the ground that "[s]uch a blanket provision would involve complications since there are numerous tracts within the reservation which are owned by non-Indians." *Id.* at 11. Presumably, the Army was referring to supposed jurisdictional "complications," in much the same fashion as South Dakota does here. Pet. Br. pp. 26-28. Significantly, Congress rejected the Army's comments and the measure was enacted, with the hunting and fishing provision intact, over the Army's objections.

The suggestion in this history of continued tribal rights regarding hunting and fishing is supported by the limited underlying federal purpose of the Taking Act—to purchase Indian lands for the Oahe project. The Act, as noted above, recognized the continuation of tribal governmental authority in several respects, and contains not a single mention of state authority. The Act also contains several provisions designed to minimize the adverse impact the flooding would have on the Tribe and its members. All this is consistent with construing the Act as preserving a measure of tribal authority over non-Indian hunting and fishing.

To be sure, the "corresponding use" language imposes limits on that tribal authority. That language prohibits the Tribe from excluding non-Indians from the Taking Area entirely, and it authorizes regulations by the Corps of Engineers as necessary to maintain and operate the Oahe project.[15] But those express limitations do not require a finding that the Act also implicitly removed all remaining tribal authority. The Taking Act did not abrogate the Tribe's treaty right in its entirety; it merely imposed what Congress viewed as necessary limitations on that right. As this Court said nearly a century ago in the context of a treaty fishing rights case:

> New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away.

United States v. Winans, 198 U.S. 371, 381 (1905).

The flaw in South Dakota's statutory argument is that it presents an "all or nothing" proposition—either all tribal rights were retained, or they were entirely lost. Nothing in the Taking Act or its legislative history supports such a construction. At most, the "corresponding use" language is subject to "two possible constructions" and therefore must "be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *County of Yakima, supra.* In short, under this Court's established principles, the Taking Act must be construed as preserving—in a manner limited by overriding federal control—tribal hunting and fishing authority over non-Indians in the Taking Area.[16]

CONCLUSION

This Court has not previously construed the Cheyenne River Taking Act. It has, however, fixed the principles which should control consideration of the impact of that Act on the Tribe's authority over hunting and fishing on the affected lands. The key principle is that congressional intent controls and that tribal rights will not be deemed

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711 F.2d at 824 n.20 ("the legislative histories of the Big Bend and Fort Randall Acts indicate that the Lower Brule Sioux received no payment for the loss of hunting and fishing rights").

[15] Regulation by the Corps of Engineers is consistent with the general scheme Congress provided in the 1944 Flood Control Act, *see* note 13 above, as well as with the acknowledgement of the regulatory authority of the Corps elsewhere in the Taking Act itself. Taking Act, Section VI.

[16] The only issue here is whether the Tribe is precluded from exercising *any* hunting and fishing authority over non-Indians on Taking Area lands. The scope of the Tribe's retained authority—and the possibility of concurrent State authority over non-Indians—are not at issue here.

lost unless that intent is made clear. South Dakota urges the Court to avoid an inquiry into the intent of Congress with respect to the Taking Act, based on *Montana* and *Brendale*. But, as demonstrated above, there is simply no basis for imputing to the Congress which enacted the Taking Act the same intent with respect to jurisdiction which guided Congress 67 years earlier in adopting the General Allotment Act. Nor do *Montana* and *Brendale* counsel such a blatant disregard for congressional intent.

The Taking Act provides for retention of tribal regulatory authority over non-Indians on the affected lands, subject to federal regulations as needed to protect the Oahe project. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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